

(2024) 01 BOM CK 0100
In the Bombay High Court
Case No : Writ Petition No. 4673 Of 2017

Shailesh Haribhau Jagtap

APPELLANT

Vs

Rahul Suresh Khetre And Others

RESPONDENT

Date of Decision : 29-01-2024

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Criminal Procedure, 1973 — Section 197, 197(1), 197(2), 197(3), 482
Indian Penal Code, 1860 — Section 341, 342, 385
Arms Act, 1959 — Section 7, 25
Maharashtra Police Act, 1951 — Section 20, 21, 37(1), 135
Bombay Police Act, 1951 — Section 147(c), 147(d), 148

Citation : (2024) 01 BOM CK 0100

Hon'ble Judges : N.J.Jamadar, J

Bench : Single Bench

Advocate : Satyavrat Joshi, Ganesh Bhujbal, S. R. Aagarkar

Final Decision : Allowed

Judgement

N. J. Jamadar, J

1. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally.

2. This Petition under Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973, is preferred to quash and set aside the order of issue of process for the offences punishable under Sections 342 and 385 of the Indian Penal Code by the learned Judicial Magistrate, First Class, Pune, in RCC No.43236 of 2016 filed by the Respondent No.2 – complainant.

3. The background facts leading to this Petition can be summerized as under :

3.1 The Petitioner was working as a Police Head Constable at Anti-Dacoity Squad, Crime Branch, Pune. Respondent No.2 – complainant alleged that on 7 October 2016 at about 9.00 a.m., the Petitioner – accused No.1 had apprehended the

Complainant at Nana Peth and took him to the office of the Anti-Dacoity Squad, Crime Branch, Pune. The accused No.1 allegedly demanded a bribe of Rs.2 Lakhs to release the Complainant, lest he would be implicated in a crime. As the Complainant expressed his inability to meet the unlawful demand, the accused No.1 confined the complainant in the said office and on 8 October 2016, the accused No.1 registered a crime at C.R. No.435 of 2016 falsely alleging that the complainant and co-accused Tejas and Sayed were found in possession of arms and thereby committed the offences punishable under Sections 7 read with 25 of the Arms Act, 1959 and Section 37(1) read with Section 135 of the Maharashtra Police Act, 1951,

3.2 Investigation was handed over to Mr. B.D. Kadam – accused No.2. The complainant alleged, neither the relatives of the complainant were informed about the arrest of the complainant, nor the complainant was produced before the Magistrate within 24 hours. It was only on 9 October 2016, the complainant was produced before the learned Magistrate.

3.3 Thus, the complainant had lodged a complaint before the learned Magistrate along with an Affidavit alleging illegal detention and wrongful confinement. The learned Magistrate directed the Complainant to take appropriate action. Thereupon, the complainant filed a complaint with Bund Garden Police Station and superior Police Officers. However, no action was taken. Hence, the complainant was constrained to lodge a private complaint before the learned Judicial Magistrate, First Class, Pune.

3.4 After recording verification statement of the complainant, and considering the material on record, the learned Magistrate was persuaded to issue process against the Petitioner alone for the offences punishable under Sections 342 and 385 of the Indian Penal Code.

3.5 The learned Magistrate was of the view that the allegations against the accused No.2 were in relation to the performance of his official duties and for want of sanction by the competent authority, he could not be proceeded against. On the contrary, the acts attributed to the accused No.1 did not form part of his official duties and, therefore, the learned Magistrate took cognizance of the offences punishable under Sections 342 and 385 of the Indian Penal Code.

3.6 The Petitioner – accused No.1 has invoked the writ jurisdiction of this Court. The legality and correctness of the impugned order is assailed on two counts. First, there was no material on the basis of which the cognizance of the offences punishable under Section 385 of the Indian Penal Code could have been taken as in the complaint and affidavit, which the complainant had filed before the learned Magistrate on 9 October 2016, there was no allegation of alleged extortion. The said allegation was a creature of afterthought and made only with a view to falsely rope in the Petitioner who had arrested the complainant in discharge of his official duties and, therefore, the prosecution amounted to abuse of the process of the court.

3.7 Second, in any event, the alleged wrongful confinement and illegal detention of the complainant was in the course of the official duty of the accused No.1. At best, it could be urged that the accused No.1 exceeded the power and it was a case of police excess. However, since the act complained of was relatable to the discharge of the official duty of arrest of the suspect, sanction under Section 197 of the Code was imperative before the learned Magistrate could take cognizance of those offences. Thus, the impugned order taking cognizance of the offences sans sanction is ex-facie illegal and deserves to be quashed and set aside.

3.8 The complainant-Respondent No.1 resisted the Petition by filing an affidavit in reply. At the outset, it was contended that the Petition suffers from the vice of suppression of facts as the Petition came to be filed after the plea of the Petitioner – accused came to be recorded. Thus, on this sole ground, the Petition is liable to be summarily dismissed.

3.9 Second, the Petitioner could have approached the Court of Session by invoking the revisional jurisdiction. On this count also, the High Court may not exercise its extra ordinary writ jurisdiction as the Petitioner has an efficacious alternate remedy.

3.10 On the merits of the matter, Respondent No.1 – complainant asserts that the allegations of wrongful confinement and illegal detention were made by the complainant on the very day the complainant was produced before the learned Magistrate. The accused No.1 has manipulated the inquiry instituted by the Commissioner of Police and also abused the custody of those documents. Since the complainant had put oath behind the statements which incriminate the accused No.1, those questions of facts cannot be delved into in exercise of extraordinary writ jurisdiction. Since a prima facie case is made out against accused No.1, and the learned Magistrate has recorded reasons for issue of process, there is no reason to interfere with the said order in exercise of writ jurisdiction. On these, amongst other, grounds, the complainant prayed for dismissal of the Petition.

3.11 An affidavit in rejoinder came to be filed by the Petitioner controverting the contentions in the affidavit in reply.

4. I have heard Mr. Satyavrat Joshi, learned Counsel for the Petitioner, Mr. Ganesh Bhujbal, learned Counsel for Respondent No.1 and Mr. S.A.Agarkar, learned APP for State, at some length. With the assistance of the learned Counsel for the parties, I have also perused the material on record, including the pleadings before the learned Magistrate and in this Court, and the documents tendered in support of the rival submissions.

5. Mr. Joshi, the learned Counsel for the petitioner, canvassed a multi-pronged submission. First, the learned JMFC committed an error in taking cognizance of the alleged offences qua the petitioner – accused No.1 sans sanction as envisaged by Section 197(2) of the Code of Criminal Procedure, 1973 ("the Code") despite being fully aware of the necessity of sanction as by the very same

order the learned JMFC declined to issue process against accused No.2 on the premise that alleged act of non-production of the complainant before the learned Magistrate, within 24 hours, was in discharge of official duty. By the same token, according to Mr. Joshi, the petitioner also ought to have been extended the protection envisaged by Section 197(2) of the Code.

6. Secondly, Mr. Joshi would urge the learned Magistrate lost sight of the fact that the offence of extortion punishable under Section 385 of the Penal Code was not prima facie made out. The complaint and the sworn affidavit filed by the complainant before the Magistrate, immediately after the complainant was remanded to judicial custody and ordered to be released on bail on 9th October, 2016, were conspicuously silent about the said allegation of unlawful demand of Rs.2,00,000/-. Thirdly, when the allegation of wrongful confinement punishable under Section 342 of the Penal Code was made before the learned Magistrate, when the complainant was first produced, the said omission to make any grievance indicates that vexatious and mala fide allegations were subsequently made to harass a public servant.

7. Mr. Joshi would urge that even if the case of the complainant of non-production of the complainant before the Magistrate within 24 hours is taken at par, at best, it would be an act in excess of the official duty and since the initial arrest was in discharge of the official duty, the failure to produce the complainant before the learned Magistrate within the stipulated period may render the detention beyond 24 hours illegal but still retain the character of an act performed in discharge of the official duty and, therefore, sanction to prosecute as envisaged by Section 197(2) of the Act before taking cognizance of the alleged offence was indispensable. Mr. Joshi further submitted that the State Government has issued a notification on 2nd

June, 1979 in exercise of the power under Section 197(3) of the Act extending the protection to all the members of the police officers as defined in the Bombay Police Act, 1951, other than the special or additional Police Officers appointed under Sections 20 or 21 of the said Act.

8. To lend support to these submissions, Mr. Joshi placed reliance on the decisions of the Supreme Court in the cases of Rizwan Ahmed Javed Shaikh & others vs. Jammal Pate & others 2001 Bom. C. R. (Cri.) 721, Anil Kumar and others vs. M. K. Aiyappa and another (2013) 10 Supreme Court Cases 705., D. T. Virupakshappa vs. C. Subhash 2015 ALL MR (Cri) 2434 (S.C). and D. Devaraja vs. Owais Sabeer Hussain (2020) 7 SCC 695.

9. Mr. Aagarkar, the learned APP, submitted that the question as to whether the alleged offences were committed in discharge of the official duty of the accused No.1 would be a matter of evidence to be adduced at the trial. Therefore, at this stage, this Court may not interdict the proceedings before the learned Magistrate.

10. Mr. Bhujbal, the learned Counsel for respondent No.2, stoutly submitted that the petition deserves to be summarily dismissed as the plea of accused No.1 has

already been recorded. Thus, it would be in the fitness of the things that the trial culminates into conviction or acquittal. Mr. Bhujbal further submitted that as the said fact of recording plea was suppressed by the petitioner – accused No.1, he does not deserve any discretionary relief. It was further submitted that the question of adequacy of the evidence in support of the charge for the offences punishable under Sections 385 and 341 of the Penal Code cannot be delved into in this proceedings.

11. The question as to whether the complainant had made the statement before the Police Officer during the course of the department enquiry against accused No.1, voluntarily or otherwise can only be determined at the stage of trial. Mr. Bhujbal would urge that the said contention essentially constitutes the defence of the accused which cannot be taken into account at this stage. Since the complainant had lodged the complaint of unlawful detention on the very day he was produced before the learned Magistrate, the complaint cannot be thrown overboard without trial, submitted Mr. Bhujbal.

12. Mr. Joshi joined the issue by canvassing a submission that there is no prohibition in law to quash the prosecution if it is found to have been initiated in breach of the statutory requirement, even if the plea of the accused has been recorded. To bolster up this submission, Mr. Joshi placed reliance on the decision of the Supreme Court in the case of *Subramaniam Sethuraman vs. State of Maharashtra and another* (2004) 13 SCC 324..

13. Mr. Joshi further submitted that there is also no prohibition in law to take into account material of sterling quality or unimpeachable character while considering a prayer for quashing the proceedings. To buttress this submission, reliance was placed on a decision of the Supreme Court in the case of *Suryalakshmi Cotton Mills Limited vs. Rajvir Industries Limited and others* (2008) 13 SCC 678..

14. I have given careful consideration to the submissions canvassed across the bar. With the assistance of the learned Counsel for the parties, I have also perused the pleadings and material on record including the copies of the documents before the learned JMFC.

15. The facts, narrated above, have been noted rather elaborately. At the heart of the matter, is the necessity of sanction for prosecution as envisaged by Section 197(2) of the Code. Whether, in the facts of the case, the sanction envisaged by Section 197(2) of the Code was required before the learned JMFC took cognizance of the offences?

16. To begin with, it is necessary to note that it could not be controverted that the petitioner – accused No.1 was one of the persons covered by the protective provisions contained in Section 197(2) of the Code. Under sub-section (3) of Section 197 the State of Government is empowered to direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein. In exercise of the said power the State Government had issued a notification on

2nd June, 1979 making the provisions of sub-section (2) Section 197 applicable to the following categories of the members of the police force in the State charged with the maintenance of public order, wherever they may be serving namely:

"1) All Police Officers as defined in the Bombay Police Act, 1951 (Bom. XXII of 1951), other than the Special or Additional Police Officers appointed under Section 21 of 22 of that Act;

2) All Reserve Police Officers as defined in the Bombay State Reserve Police Force Act, 1951 (Bom. XXXVIII of 1951)."

17. In the case of Rizwan Ahmed Javed Shaikh (supra), the facts in which have a striking resemblance to the facts in the case at hand, a submission was canvassed on behalf of the complainant therein that the protection envisaged by Section 197(2) of the Code would be available only to those police officers, who were discharging duty in relation to maintenance of public order and not a duty relatable to law and order only.

Repelling the contention, the Supreme Court held that the phrase maintenance of public order need not be assigned a narrow meaning as is assigned to it in preventive detention matters. The police officers do discharge duties relating to maintenance of public order in its wider sense. The Supreme Court inter alia observed as under:

"9. The person on whom the protection is sought to be conferred by the State Government notification is to be determined by reading the notification and once it is found that the State Government notification applies to the member of the force which the accused is, the scope, purview or compass of the protection has to be determined by reading sub-section (2) of Section 197 of the Code, i.e., by asking a question whether the act alleged to be an offence was done or purports to have been done in the discharge of the official duty of the accused. Such official duty need not necessarily be one related to the maintenance of public order."

18. This propels me to the question as to whether the alleged act which constitutes the offence attributable to the petitioner – accused No.1 had any nexus with the duty which accused No.1 was discharging. On factual score, this aspect is required to be considered in two parts. First, the allegations in respect of the offence punishable under Section 385 of the Penal Code (putting a person in fear of injury in order to commit extortion) and, second, relating to offence punishable under Section 342 of the Penal Code (wrongful confinement).

19. It would be contextually relevant to note that the crux of the allegations in the complaint is that accused No.1 had picked up the complainant on 7th October, 2016 at about 9.00 am. near Quarter Gate, Nana Peth, Pune, took him to Anti-Dacoity Squad, Crime Branch, Pune; detained him thereat and demanded an amount of Rs.2,00,000/- lest he would implicate accused No.1 in a case for

possessing firearm without licence and upon the complainant expressing his inability to pay the said amount, the petitioner – accused No.1 confined him in the said office and on the next day i.e. 8th June, 2016 CR No.435/2016 was registered against him and co-accused and on 9th October, 2016 at about 4.20 pm. he was produced by accused No.2 before the learned Magistrate.

20. In the backdrop of the aforesaid nature of the accusation, the alleged act of demanding a sum of Rs.2,00,000/- by putting the complainant in fear of a false prosecution, in the event the demand was not met, by no stretch of imagination can be said to relate to the official duty which the petitioner was then discharging. To put it in other words, it was no part of the duty of the petitioner to commit extortion in the said fashion, as alleged. Therefore, the question that wrenches to the fore is, whether the said allegation was prima facie borne out by the material on record.

21. Two circumstances were pressed into service on behalf of the petitioner to draw home the point that the said allegation is a creature of an afterthought. One, in the complaint dated 9th October, 2016, and the sworn affidavit in support thereof there was no reference to the alleged demand of Rs.2,00,000/-. Two, in the statement before the Police Officer, during the course of a departmental enquiry, the complainant disowned the said allegation and asserted that the said complaint was made at the behest of the Advocate who then represented him.

22. The first circumstance, in my considered view, is of material salience. On 9th October, 2016, purportedly after the complainant was remanded to judicial custody, the complainant filed an application making allegations that he was picked up by the petitioner – accused No.1 on 7th October, 2016 at about 9.00 am and detained at Anti-Dacoity Squad, Crime Branch, Pune. He was neither produced before the Magistrate. Nor his relatives were informed about the said fact. Accused No.2 had produced complainant before the Court on 9th October, 2016 only and, therefore, action be initiated against accused Nos.1 and 2. The learned Magistrate passed an order that accused – complainant herein, may take appropriate action for the alleged acts. The said complaint was supported by an affidavit dated 9th October, 2016 containing almost identical affirmations. Evidently, the allegations of unlawful demand of Rs.2,00,000/- with a threat of false implication did not find mention therein.

23. In the statement dated 27th November, 2016 before the Police Officer during the course of the enquiry, as noted above, the complainant did not subscribe to the aforesaid allegations in the complaint dated 9th October, 2016. Mr. Bhujbal would urge that, on the one hand, the custody of the said document with the petitioner suggests that the prosecution is hand in glove with the accused No.1. Secondly, the questions, whether such statement was made, and even if assumed to have been made, voluntariness and reliability thereof are matters for adjudication at the trial.

24. Even if the aforesaid submission of Mr. Bhujbal is acceded to unreservedly and the said statement made during the course of the departmental enquiry, is eschewed from consideration yet the first circumstance of absence of allegation of demand not only in the complaint but also in the affidavit sworn by the complainant cannot be said to be inconsequential. As claimed by the complainant, the said complaint and affidavit have the element of spontaneity. The demand of Rs.2,00,000/- for not implicating the complainant in the crime, was such a notorious fact that the complainant would not have missed to state the same. The fact that the complainant had made the complaint and had also sworn an affidavit in support thereof, erodes credence of the explanation that the said allegation was not made on account of the then situation of the complainant.

25. There is another facet which is of critical significance. When the complainant was first produced before the learned Magistrate on 9th October, 2016, the complainant had not made any grievance, as is evident from the order passed by the learned Magistrate. The learned Magistrate recorded that none of the accused made any complaint of ill-treatment at the hands of the police. This circumstance also militates against the veracity of the allegation that accused No.1 had made an attempt to extort money from the complainant by putting him in fear of the prosecution.

26. A useful reference in this context can be made to a decision of the Supreme Court in the case of State of Orissa vs. Ganesh Chandra Jew(2004) 8 SCC 40., wherein in the backdrop of the accusation of police excess, the absence of such complaint before the Magistrate was taken into account by the Supreme Court. The observations in paragraph 20 read as under:

"20. When the background facts of the case are considered the question regarding applicability of Section 197 of the Code takes a temporary back seat. The factual scenario as indicated above goes to show that on 28.2.1991 respondent was produced before the Magistrate. He was specifically asked as to whether there was any ill-treatment. Learned SDJM specifically records that no complaint of any ill-treatment was made. This itself strikes at the credibility of the complaint. Additionally, the doctor who has examined him stated that for the first time on 2.3.1991 he treated the complainant. Though there are several other aspects highlighted in the version indicated in the complaint and the materials on record are there, we do not think it necessary to go into them because of the inherent improbabilities of the complainant's case and the patent mala fides involved. It is no doubt true that the threshold interference by exercise of jurisdiction under Section 482 of the Code has to be in very rare cases, and this case appears to be of that nature. It fits in with the category no.7 of broad categories indicated in State of Haryana v. Bhajan Lal (1992 Supp (1) SCC 335). It is to be noted that though plea regarding non-complaint before the Magistrate was specifically taken to justify interference, the High Court has not dealt with this aspect at all thereby adding to the vulnerability thereof."

(emphasis supplied)

27. In the totality of the circumstances, I find substance in the submissions of Mr. Joshi that in the face of the material on record, especially the written complaint and sworn affidavit in support thereof dated 9th October, 2016, the learned Magistrate could not have taken cognizance of the offence punishable under Section 385 of the Penal Code.

28. This lead me to the pivotal question of the necessity of sanction for prosecution as envisaged by Section 197(2) of the Code in the context of the allegations of the offence punishable under Section 342 of the Penal Code. Whether the alleged act of advancing the date and time of arrest and non-production of accused before the jurisdictional Magistrate within the stipulated period from the date of the arrest, are relatable to the duty then being discharged by the petitioner – accused No.1, so as to get the protection under Section 197(2) of the Code. The object of insisting for sanction for prosecution, under Section 197(2) of the Code, is to protect a public servant discharging official duties from harassment by vexatious, frivolous and at times retaliatory, proceedings, for performing official duties. Such a protective measure is necessary to instill a sense of confidence in the public servants to discharge their official duties without fear of vindictive reprisal by the disgruntled elements. At the same time, the discharge of public duties provides an opportunity for the public servants to commit acts or omissions which may constitute offences. In such a situation if the public office is abused to commit offences, the public servant cannot be insulated from the consequences of the commission of those offences. Vesting of power in the appropriate Government to examine whether sanction for prosecution deserves to be accorded, having regard to the nature of the accusation and the duty which the public servant was discharging at a given point of time, serves the dual purpose of protecting the public servant and at the same time advancing the cause of public justice by according sanction for prosecution where there was no nexus between the duty and the act complained of.

29. While determining as to whether the particular act complained of was part of the official duty of the public servant, it is necessary to steer clear of two extremes. One, construing the expression, "any offence alleged to have been committed while acting or purporting to act in the discharge of official duty" too narrowly. In that event, the section would be rendered altogether otiose for it is no part of an official duty to commit an offence. Two, construe the said expression too widely in the sense that it subsumes every act constituting an offence committed in the course of the same transaction in which the official duty is performed or purports to have been performed. The difficulty therefore presents in applying the correct test to judge whether the act complained of was performed in discharge of official duty or purported discharge of the duty. In the case of *S. B. Saha and others vs. M. S. Kochar* 1985 SCC 1841 the Supreme Court after an analysis of the previous precedents, enunciated the position as under:

"18. The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the Section will be rendered altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be". In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision. As pointed out by Ramaswami J. in *Bajinath v. State of Madhya Pradesh* AIR 1966 SC 220 at p 222 "it is the quality of the act that is important, and if it falls within the scope and range of his official duties, the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted."

19. In sum, the sine qua non for the applicability of this Section is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him.

20. While the question whether an offence was committed in the course of official duty or under colour of office, cannot be answered hypothetically, and depends on the facts of each case, one broad test for this purpose, first deduced by Varadachariar J. of the Federal Court in *Hori Ram v. Emperor*, 1939 FCR 159 is generally applied with advantage. After referring with approval to those observations of Varadachariar J., Lord Simonds in *H.H.B. Gill v. The King* AIR 1948 PC 128 tersely reiterated that the "test may well be whether the public servant, if challenged, can reasonably claim, that what he does, he does in virtue of his office."

21. Speaking for the Constitution Bench of this Court, Chandrasekhar. Aiyer J., restated the same principle, thus:

".....in the matter of grant of sanction under Section 197, the offence alleged to have been committed by the accused must have something to do, or must be related in some manner, with the discharge of official duty... there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty".

(emphasis in original)

30. Following the aforesaid pronouncement, in the case of *Rizwan Ahmed Javed Shaikh* (supra), the Supreme Court expounded the true test as under:

"15. The real test to be applied to attract the applicability of Section 197 (3) is whether the act which is done by a public officer and is alleged to constitute an offence was done by the public officer whilst acting in his official capacity though what he did was neither his duty nor his right to do as such public officer. The act complained of may be in exercise of the duty or in the absence of such duty or in dereliction of the duty, if the act complained of is done while acting as a public officer and in the course of the same transaction in which the official duty was performed or purports to be performed, the public officer would be protected."

(emphasis supplied)

31. In the case of D. T. Virupakshappa (supra) where it was alleged that the appellant – police officer had exceeded in exercising his power during investigation of a criminal case and assaulted the respondent in order to extract some information with regard to the death of a person and, in that connection, the respondent was detained in the police station for some time, the Supreme Court held that the whole allegation was that of appellant exceeding his power in connection with the investigation of a criminal case. The said offensive conduct was reasonably connected with the performance of the official duty of the appellant and, therefore, the learned Magistrate could not have taken cognizance of the case without the previous sanction of the State Government.

32. In Rizwan Ahmed (supra) the facts were that respondent No.1 a Sub-Inspector then attached to Chembur Police Station had come to the residence of the appellants on 28th March, 1986 at about 8.30 pm. and forced the three appellants to accompany him to Chembur Police Station, where they were put up in the lock up. At about 2 am. on 29th March, 1986 the appellants were put up in a police van and brought to Bhandup Police Station and placed in the lock up. It was only on 30th March, 1986 the appellants were produced before the learned Metropolitan Magistrate, Bhoiwada, Dadar. The appellants had filed a complaint before the Metropolitan Magistrate, 27th Court, Mulund, impleading respondent No.1 and other police officers for the offences punishable under Sections 220, 342 of the Penal Code and Section 147(c), (d) and 148 of Bombay Police Act, 1951.

33. In the aforesaid factual background, the Supreme Court held as under:

"16. Cognizable and non-bailable offences were registered against the appellants. They were liable to be arrested and detained. The gravamen of the charge is the failure on the part of the accused persons to produce them before a Magistrate within 24 hours of arrest. The complainants were in the custody of the police officers and at the police station.

It cannot be denied that the custody which was legal to begin with became illegal on account of non-production of the complainants before the Magistrate by the police officers officially detaining the appellants at a place meant for detaining the persons suspected of having committed an offence under investigation. The act constituting an offence alleged to have been committed by the accused-

respondents was certainly done by them in their official capacity though at a given point of time it had ceased to be legal in spite of being legal to begin with. On the totality of the facts and circumstances of the case in our opinion the learned Magistrate and the High Court have not erred in holding the accused-respondents entitled to the benefit of protection under Section 197 (2) of the Cr.P.C.”

(emphasis supplied)

34. The aforesaid pronouncement in the case of Rizwan Ahmed (supra) appears to be on all four with the facts of the case at hand. The crux of the allegations in the complaint before the learned Magistrate was that though the complainant was apprehended on 7th August, 2006 at about 9.00 am. and confined at the Anti-Dacoity Squad office he was shown to have been arrested in CR No.435/2016, registered with Chaturshrungi Police Station, for the offences punishable under Sections 7 read with 25 of the Arms Act, 1959 and Section 37(1) read with Section 135 of the Maharashtra Police Act, 1951, on 8th October, 2016 and was produced before the Magistrate on 9th October, 2016. The alleged arrest of the complainant on 7th October, 2016 was in exercise of the duty which the accused No.1 was then discharging and thus the detention beyond the stipulated period may be in excess of the power. However, there did exist nexus between the act complained of and the official duty of the accused No.1.

35. What makes the order passed by the learned JMFC vulnerable is the fact that the learned Magistrate declined to take cognizance of the offence qua accused No.2, the Investigating Officer, who had produced the complainant before the learned Magistrate, on the premise that the omission to produce the complainant within the stipulated period was relatable to the discharge of the official duty. I find substance in the submission of Mr. Joshi that the petitioner – accused No.1 was also entitled to the same dispensation.

36. In substance, the allegations of extortion punishable under Section 385 of the Penal Code were prima facie unsustainable and appeared to be a creature of afterthought and the allegations of wrongful confinement punishable under Section 342 of the Code clearly fall within the protective umbrella of Section 197(2) of the the Code.

37. The conspectus of aforesaid consideration is that since the case falls within the ambit of category (6) of the propositions laid down in the case of State of Haryana vs. Bhajan Lal 1992 Supp (1) SCC 335 as the cognizance could not have been taken sans sanction under Section 197(2) of the Code, the continuation of the prosecution constitutes an abuse of the process of the court. I am, therefore, inclined to allow the petition.

38. Hence the following order

: ORDER:

(i) The petition stands allowed in terms of prayer Clause (a).

(ii) The proceedings in Complaint S.T.C. No.43236/2016 pending on the file of Judicial Magistrate, First Class, Pune, and the orders passed therein, stand quashed and set aside.

(iii) Rule made absolute to the aforesaid extent. No costs.